UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Bear Creek Bible Church, et al., Plaintiffs, v. **Equal Employment Opportunity Commission**, et al., Defendants.	Case No. 4:18-cv-00824-O

CONSOLIDATED BRIEF IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The defendants have raised both jurisdictional and merits-based objections to our motion for summary judgment, and we will address their arguments in the order that they appear in their brief.

But we will begin with an observation about terminology. In a footnote, the defendants explain that they will use the term "LGBTQ" to describe the individuals that the plaintiffs do not wish to employ, and they suggest that our use of other terminology to describe these individuals is pejorative.[1] The defendants' desire to use a widely accepted and non-pejorative term such as LGBTQ is understandable, but in this case it is imprecise—and we respectfully submit that the Court should not employ it. The term "LGBTQ" is capacious and includes individuals that the plaintiffs would not object to employing. The "Q" in the acronym includes people who are merely "questioning" their sexual orientation or gender identity,[2] and the plaintiffs have expressed no objections to employing individuals in that category so long as they do not engage in homosexual acts or gender-nonconforming behavior. In like manner, the "L," "G," and "B" categories include individuals with homosexual or bisexual orientations who do not engage in homosexual conduct, and the plaintiffs have not expressed any reservations about hiring celibate homosexuals, or bisexuals who do not engage in sexual behavior outside an opposite-sex marriage. *See* Salvesen Decl. (ECF No. 90-4) at ¶ 11; Hotze Decl. (ECF No. 90-5) at ¶ 15. It is crucial to maintain the distinction between an individual's orientation (or identity) and the individual's behavior,[3] and the "LGBTQ" moniker does not do that.

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1. *See* Defs.' Br. (ECF No. 96) at 1 n.1.
2. *See, e.g.*, The Lesbian, Gay, Bisexual, and Transgender Community Center, *What is LGBTQ?*, available at https://gaycenter.org/about/lgbtq (last visited on July 12, 2021).
3. *See, e.g.*, Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* (October 1, 1986) at ¶ 3 (acknowledging that "the particular inclination of the homosexual person is not a sin," while insisting that "the living out of this orientation in homosexual activity is [not] a morally acceptable option."), available at https://bit.ly/3rbqJvS (last visited on July 12, 2021).

I. The Defendants' Jurisdictional Objections Are Without Merit

The defendants raise three jurisdictional objections: (1) Lack of Article III standing; (2) Lack of ripeness; and (3) Sovereign immunity. None of these jurisdictional objections have merit.

A. The Plaintiffs Have Established Article III Standing

The EEOC is interpreting and enforcing Title VII in a manner that compels religious organizations to employ individuals who engage in homosexual and transgender behavior. *See* Br. in Support of Pls.' Mot. for Sum. J. Ex. 1–3 (ECF Nos. 90-1, 90-2, 90-3); *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (6th Cir. 2018). This inflicts Article III injury by forcing the plaintiffs to run the risk of an EEOC enforcement action if they continue to operate their places of employment in accordance with the teachings of their faith. The plaintiffs' Article III injury is clearly set forth in the affidavits of Pastor Salvesen and Dr. Hotze, as well as the undisputed evidence submitted in this case. *See* Salvesen Decl. (ECF No. 90-4) at ¶ 5–17; Hotze Decl. (ECF No. 90-5) at ¶ 8–18.

The defendants claim that the plaintiffs lack Article III standing because the EEOC has not taken any enforcement action against them yet, and because no employee or job applicant has complained to the EEOC about the plaintiffs' employment policies. *See* Defs.' Br. (ECF No. 96) at 8. The defendants also insist that the plaintiffs must produce evidence showing that they have violated (or are about to violate) the EEOC's interpretation of Title VII with respect to a particular employee or job applicant. *See id.* ("Plaintiffs have not set forth evidence that they have taken or will take actions that could result in an enforcement action against them."). But none of this defeats the plaintiffs' standing or refutes their showing of Article III injury. A litigant who brings a pre-enforcement lawsuit is not required to allege or prove an imminent enforcement action directed at him specifically. And he is not required to violate the law in a manner that exposes him to penalties as a prerequisite to seeking pre-

enforcement relief. A plaintiff needs only to allege and prove a "credible threat"[4] or an "actual and well-founded fear"[5] that he *might* be subject to enforcement proceedings—and the plaintiffs have done more than enough to satisfy these requirements for a pre-enforcement challenge.

1. The Plaintiffs Are Not Required To Allege Or Prove An Imminent Enforcement Action Directed At Them

A litigant seeking pre-enforcement relief is not required to allege an imminent or threatened enforcement action directed *at him*. That much is clear from *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020), where the Fifth Circuit allowed a student group to bring a pre-enforcement challenge to university speech codes despite "declarations by University officials" that "the University lacks any intention to penalize the intended conduct of Speech First's members." *Id.* at 336; *see also id.* ("[A] plaintiff who mounts a pre-enforcement statutory challenge on First Amendment grounds need not show that the authorities have threatened to prosecute him" (citation and internal quotation marks omitted)). It is also clear from the Supreme Court's pronouncements on pre-enforcement challenges outside the First Amendment context. In *Doe v. Bolton*, 410 U.S. 179 (1973), for example, the Court allowed doctors to bring a pre-enforcement challenge to Georgia's abortion law, "despite the fact that the record does not disclose that any one of them has been prosecuted, *or threatened with prosecution*, for violation of the State's abortion statutes." *Id.* at 188 (emphasis added). It was enough for the doctors to show that the Georgia abortion statute was "recent and not moribund," and that it was the successor to another Georgia abortion statute under which *some* physicians were prosecuted. They did not need to allege or prove an "imminent or threatened" prosecution directed at them specifically. They needed only to establish a credible

4. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020).
5. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

threat that the statute would be enforced against physicians generally, and that it was not a defunct or antiquated statute that was no longer being enforced against anyone.

And in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court permitted abortion providers to challenge Nebraska's partial-birth abortion statute on the ground that it would prohibit the dilation and evacuation (D&E) procedure—despite the fact that the Attorney General of Nebraska had specifically disclaimed an intent to enforce the statute against any doctor who performed D&E abortions. *See id.* at 938-46. The Court allowed the doctors to raise this pre-enforcement challenge because "some present prosecutors and future Attorneys General *may choose to pursue* physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment." *Id.* at 945 (emphasis added). The Court found that this mere *possibility* of future prosecution—even though it had been specifically disclaimed by the current Attorney General—not only imposed an Article III injury on abortion providers, but also violated the Constitution by imposing an "undue burden" on women seeking abortions. *See id.* at 945-46.

Finally, the Eighth Circuit's ruling in *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019), allowed a Christian videography business (Telescope Media) to bring a pre-enforcement First Amendment challenge to the Minnesota Human Rights Act—even though Telescope Media had not yet entered the wedding-video business, and even though it was not facing any enforcement action (or any impending or threatened enforcement) from the state authorities. *See id.* at 749–50. The Eighth Circuit held that Telescope Media had alleged a "credible threat of enforcement" sufficient to establish standing under *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), because Minnesota had "publicly announced" that its statute would require wedding vendors to provide equal services for same-sex and opposite-sex weddings, and the state had already enforced the Act against one wedding vendor who refused to rent out a venue for a same-sex wedding. *See id.* It was enough for Telescope Media to allege that it intended to violate the Minnesota Human Rights Act and that the

state authorities had enforced the statute against a similar religious objector. The Court did not require Telescope Media to allege a threatened enforcement action directed at it specifically.

The defendants are correct to observe that an "injury" under Article III must be "actual or imminent," and not "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted); *see also* Defs.' Br. (ECF No. 96) at 7. But the defendants are mischaracterizing the relevant "injury" in this case. In a pre-enforcement challenge, a plaintiff is not required to prove that he is facing an "actual or imminent" *enforcement action*. Instead, the injury comes from the *fear* or the threat that he might be subjected to enforcement proceedings if he acts in a desired manner—and from the chilling effect that this fear imposes on his constitutional freedoms. *See American Booksellers Ass'n*, 484 U.S. at 393 (an "actual and well-founded *fear* that the law will be enforced against them" suffices to confer standing in a pre-enforcement suit) (emphasis added); *Susan B. Anthony List*, 573 U.S. at 159 (a "credible *threat*" of prosecution or enforcement establishes standing in pre-enforcement litigation) (emphasis added); *Babbitt*, 442 U.S. at 298 (same); *Speech First*, 979 F.3d at 335 (same). *That* injury is "actual or imminent" even if it never leads to an actual prosecution or enforcement action brought against the plaintiff.[6]

The defendants do not deny that the plaintiffs have established an "actual and well-founded *fear*" or a "credible *threat*" of future enforcement action if they defy the EEOC and continue excluding practicing homosexuals and gender non-conforming individuals from employment. Indeed, the defendants do not even acknowledge that an "actual and well-founded *fear*" or a "credible" or "substantial"[7] *threat* is all that is needed to establish Article

6. *See also Diamond v. Charles*, 476 U.S. 54, 64 (1986) ("[P]ossible criminal prosecution" enough to confer Article III standing in a pre-enforcement lawsuit).

7. Courts have also said that plaintiffs in pre-enforcement lawsuits must allege a "substantial" threat that challenged law will enforced against them. *See Susan B. Anthony List*, 573 U.S. at 164; *Speech First*, 979 F.3d at 334-36. The opinions in *Susan B. Anthony*

III injury in a pre-enforcement lawsuit—and their entire argument is based on the mistaken premise that plaintiffs in pre-enforcement lawsuits must allege and prove an actual and imminent enforcement action directed at them. *See* Defs. Br. (ECF No. 96) at 6–11. But the uncontested evidence in this case shows that the EEOC: (1) Has announced through its adjudications and guidance documents that Title VII prohibits employers from discriminating against individuals who engage in homosexual or gender non-conforming conduct;[8] (2) Refuses to recognize a religious exemption to these supposed requirements of Title VII that will shield the plaintiffs from future enforcement action;[9] and (3) Has already sued at least one religious employer for discriminating against a transgender employee, despite the protections conferred by the Religious Freedom Restoration Act and despite the employer's sincere religious objections to gender non-conforming behavior.[10] And the unrebutted declarations from Pastor Salvesen and Dr. Hotze show that the plaintiffs regard the EEOC's actions as a threat that they will likewise face investigation or enforcement action if a job applicant or employee complains to the EEOC about their employment policies. *See* Salvesen Decl. (ECF No. 90-4) at ¶ 17; Hotze Decl. (ECF No. 90-5) at ¶ 18.

The fears expressed in the Salvesen and Hotze declarations are "actual and well-founded,"[11] and the threats that they perceive are both "credible" and "substantial."[12] A "credible threat" can arise from the government's prosecution of *others*, even if the plaintiff himself has never been prosecuted or directly threatened by the authorities. *See Doe*, 410 U.S. at 188; *Telescope Media Group*, 936 F.3d at 749–50; *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) ("[A] threat of government prosecution is credible if . . . there is a history

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List and *Speech First* regard the terms "credible threat" and "substantial threat" as interchangeable, and so will we.

8. *See* Br. in Support of Pls.' Mot. for Sum. J. Ex. 1–3 (ECF Nos. 90-1, 90-2, 90-3).
9. *See* Br. in Support of Pls.' Mot. for Sum. J. Ex. 1–3 (ECF Nos. 90-1, 90-2, 90-3).
10. *See EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (6th Cir. 2018).
11. *American Booksellers Ass'n*, 484 U.S. at 393.
12. *Susan B. Anthony List*, 573 U.S. at 159; *Babbitt*, 442 U.S. at 298; *Speech First*, 979 F.3d at 330.

of past prosecution or enforcement under the challenged statute." (citation and internal quotations omitted)). And the Commission's actions against Harris Funeral Homes are all that is needed to establish a "credible threat" that the plaintiffs (and other religious employers) may face investigation or enforcement action if they refuse to employ individuals engaged in homosexual conduct or gender non-conforming behavior—especially when the EEOC refuses to disavow the possibility of enforcing *Bostock* against the plaintiffs and other employers with sincere religious objections to homosexuality and transgenderism.

Consider the Supreme Court's ruling in *American Booksellers*. The court of appeals recognized that the plaintiffs in that case had never been prosecuted or even *threatened* with prosecution under the statute. *See American Booksellers Ass'n, Inc. v. Virginia*, 802 F.2d 691, 693 (4th Cir. 1986) ("[T]here has been no proof that the Booksellers have been prosecuted, *threatened with prosecution*, or have detrimentally changed their behavior as a result of the amendment." (emphasis added)). Yet the Supreme Court allowed the pre-enforcement challenge, because the plaintiffs had alleged a credible *fear* of prosecution despite the absence of a specific threat. *See American Booksellers Ass'n*, 484 U.S. at 393. Consider also the Second Circuit's ruling in *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd on other grounds*, *Vacco v. Quill*, 521 U.S. 793 (1997), which allowed doctors to bring a pre-enforcement challenge over a statute outlawing physician-assisted suicide, even though the district attorney *said* that he would not bring criminal charges against them. *Id.* at 723. In the court's view, it was enough that the district attorney had criminally prosecuted a *non-physician* for helping his wife commit suicide under an entirely different criminal statute:

> Although District Attorney Morgenthau argues in his brief on appeal that appellants have not shown that they are in any jeopardy of prosecution in New York County, a recent indictment by a New York County grand jury demonstrates the contrary. A newspaper report printed on December 15, 1995 disclosed the following: 'Yesterday, District Attorney Robert M. Morgenthau of Manhattan announced that a grand jury had indicted [George] Delury, an editor who lives on the Upper West Side, on manslaughter charges for helping his 52-year-old wife, Myrna Lebov, commit suicide last summer.' Carey Goldberg, *Suicide's Husband Is Indicted; Diary Records Pain of 2 Lives,* N.Y. Times,

> Dec. 15, 1995, at B1. The physician plaintiffs have good reason to fear prosecution in New York County.

Id. at 723 (2d Cir. 1996), *rev'd on other grounds*, *Vacco v. Quill*, 521 U.S. 793 (1997) (footnote omitted). And the EEOC wants to contend that its decision to sue Harris Funeral Homes does *not* give the plaintiffs "reason to fear" future investigation and enforcement action?

2. The Plaintiffs Are Not Required To Violate The Law In A Manner That Exposes Them To Prosecution Or Enforcement Action As A Prerequisite To Seeking Pre-Enforcement Relief

The defendants also contend that the plaintiffs must wait until an actual job applicant or employee emerges who is engaged in homosexual or transgender behavior, and then sue the EEOC for declaratory relief once it becomes certain that they will take actions that violate the EEOC's interpretation of Title VII. *See* Defs.' Br. (ECF No. 96) at 7 ("Plaintiffs have no contemporaneous awareness of a single LGBTQ employee or applicant."); *id*. at 8 ("Plaintiffs have not set forth evidence that they have taken or will take actions that could result in an enforcement action against them."). But a litigant is not required to wait until he needs to break the law—or violate the law as interpreted by the EEOC—before he can sue for pre-enforcement relief. And the defendants' stance would leave the plaintiffs subject to penalties and lawsuits if a court rejects their belated claims for declaratory relief against the EEOC. The entire point of declaratory judgments and pre-enforcement challenges is to allow litigants to seek judicial declarations of their rights *before* exposing themselves to punishment or enforcement actions. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1154 (5th Cir. 1993) ("'The purpose of the Declaratory Judgment Act is to settle 'actual controversies' *before* they ripen into violations of law or breach of some contractual duty.'" (citation omitted)). Yet the defendants' argument—if accepted by this Court—would thrust the plaintiffs into the very dilemma

that a pre-enforcement challenge is supposed to avoid. As the Fifth Circuit has eloquently explained:

> To insist that a person must break the law in order to test its constitutionality is to risk punishing him for conduct which he may have honestly thought was constitutionally protected. Not only is this prima facie unfair, but it discourages people from engaging in protected activity and enforcing constitutional rights.

International Society for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809, 821 (5th Cir. 1979).

The defendants' position is also incompatible with *Telescope Media*, which allowed a Christian wedding vendor to launch a pre-enforcement challenge to a state anti-discrimination law before it had even entered the wedding-video business. *See Telescope Media Group*, 936 F.3d at 749–50. Here, too, it is untenable to require a wedding vendor to wait until a same-sex couple appears and requests its services before seeking declaratory relief, because an unsuccessful lawsuit will leave the wedding vendor exposed to penalties from the state over its refusal to provide the requested services. *See, e.g.*, *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019), cert. denied, 2021 WL 2742795 (July 2, 2021). For the same reason, a Christian employer has standing to seek declaratory relief against the EEOC before it is forced to take action against an actual homosexual or transgender job applicant or employee, which would leave the employer on the hook for penalties if the courts wind up rejecting its RFRA and First Amendment claims.

* * *

If the defendants' argument were accepted by this Court, it would establish a cat-and-mouse game in which the EEOC remains free to sue any religious employer (such as Harris Funeral Homes) over its refusal to employ homosexual or transgender individuals, while simultaneously remaining able to swat away pre-enforcement lawsuits by claiming that it hasn't threatened that particular employer with investigations or enforcement proceedings. It would also force every employer with religious objections to *Bostock* to wait until they must violate Title VII—and expose to themselves to penalties and lawsuits—before seeking a judicial

declaration of their rights. A regime of this sort would never be tolerated in any other context—not in cases involving abortion rights,[13] not in cases challenging laws against doctor-assisted suicide,[14] and not with regard to any First Amendment activity other than speech or conduct that offends the LGBTQ community.[15]

The defendants want this Court to create a new allowance for governmental entities to deter disfavored speech and conduct by firing occasional shots across the bow while insulating their threats from pre-enforcement review and forcing everyone to choose between self-censorship and exposure to possible future enforcement proceedings. But the established rules governing pre-enforcement challenges are not subject to a political-correctness exception,[16] and they do not allow the EEOC to keep religious organizations guessing as to whether they can operate their places of employment in accordance with the teachings of their faith. The EEOC guidance documents—along with its lawsuit against Harris Funeral Homes—are more than enough to strike "an actual and well-founded fear"[17] into the heart of the plaintiffs and other religious employers throughout the United States who decline to employ homosexuals or transgender individuals on account of their religious faith.

B. The Plaintiffs Have Established Ripeness

In determining whether a claim is ripe, a Court must consider: (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The undisputed evidence in this case shows that each of these factors is satisfied.

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13. *See Doe v. Bolton*, 410 U.S. 179, 188 (1973).
14. *See Quill v. Vacco*, 80 F.3d 716, 723 (2d Cir. 1996), *rev'd on other grounds*, *Vacco v. Quill*, 521 U.S. 793 (1997).
15. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988); *New York Republican State Committee v. SEC*, 799 F.3d 1126, 1135-36 (D.C. Cir. 2015) ("For many decades, the courts have shown special solicitude to pre-enforcement challenges brought under the First Amendment").
16. *See City of Chicago v. Morales*, 527 U.S. 41, 81 (1999) (Scalia, J., dissenting).
17. *American Booksellers Ass'n*, 484 U.S. at 393 (1988).

A claim is "fit for judicial decision" if it presents a pure question of law. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (finding the "fitness" factor to be "easily satisfied" because "petitioners' challenge to the Ohio false statement statute presents an issue that is 'purely legal, and will not be clarified by further factual development.'" (quoting *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 581 (1985)). The defendants do not dispute this, but they claim that the plaintiffs' RFRA and Free Exercise claims present "mixed questions of fact and law" rather than pure questions of law, and that the "substantial burden" and "compelling interest" tests must be applied in a plaintiff-specific and fact-intensive matter. *See* Defs.' Br. (ECF No. 96) at 12.[18]

None of this defeats ripeness because there are no disputed questions of fact in this case, and the only issues for this Court to resolve concern the meaning of RFRA and the First Amendment. The defendants are not, for example, questioning the sincerity of the plaintiffs' religious beliefs, and they do not contest any of the factual claims asserted in the Salvesen and Hotze declarations. How can these issues *not* be "fit for judicial decision"? Even if the defendants are right to observe that the Court must apply RFRA and First Amendment claims to the facts of these particular employers, it remains a purely legal question whether Title VII (as construed by the EEOC) "substantially burdens" the religious freedom of those who do not wish to employ individuals who engage in homosexual or transgender behavior. And it remains a purely legal question whether the government's interest in enforcing *Bostock* is "compelling" enough to force claims of constitutional right to give way. The defendants also never explain how these claims would become *more* "fit for judicial decision" if the plaintiffs were forced to wait until the EEOC specifically threatens them with enforcement proceedings over their refusal to employer a particular homosexual or transgender individual. Nothing in the resolution of these legal questions should depend on the facts of a particular

18. The defendants do not appear to be contending that Claims 4 and 5, which concern the interpretation of Title VII and the meaning of *Bostock*, present "mixed" questions rather than "pure" questions of law.

employee or job applicant, so it is not apparent how anything would be gained from telling the plaintiffs to return to court later.

As for "hardship to the parties": The Court's answer to this question should mirror its answer on the Article III standing issues, and the Supreme Court's opinion in *Susan B. Anthony List* suggests that the standing and ripeness inquiries merge in pre-enforcement litigation. *See Susan B. Anthony List*, 573 U.S. at 167–68. So we agree with the defendants on this much: If this Court concludes that the plaintiffs lack Article III injury, then it logically follows that there can be no "hardship" to the plaintiffs in withholding judicial consideration at this time. *See* Defs.' Br. (ECF No. 11–12).

But the converse is also true: If the Court finds the plaintiffs are suffering "injury in fact" from the *in terrorem* effects of the EEOC's guidance documents and its lawsuit against Harris Funeral Homes, then there will by definition be "hardship" to the plaintiffs from prolonging this injury and delaying the resolution of their claims. *See Susan B. Anthony List*, 573 U.S. at 167–68 ("Denying prompt judicial review would impose a substantial hardship on petitioners, forcing them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other."); *Franciscan Alliance*, 227 F. Supp. 3d at 681 ("Substantial hardship is typically satisfied when a party is forced to choose between refraining from allegedly lawful activity or engaging in the allegedly lawful activity and risking significant sanctions.").

C. The Defendants' Sovereign-Immunity Defense Is Without Merit

Each of the plaintiffs' claims falls squarely within the waiver of sovereign immunity set forth in the second sentence of 5 U.S.C. § 702:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. All of the plaintiffs' claims: (1) were filed in a court of the United States; (2) seek relief other than money damages; and (3) state a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority. The plaintiffs are attacking the EEOC's announced interpretations of Title VII, which indisputably qualifies as an "act in an official capacity," and they are not seeking money damages. The defendants do not deny any of this, and that is all that is needed to surmount a sovereign-immunity defense.

The defendants, however, insist that plaintiffs must *also*: (1) "identify some 'agency action' affecting [them] in a specific way" and (2) show that they have "suffered legal wrong because of the challenged agency action, or [are] adversely affected or aggrieved by that action within the meaning of a relevant statute." Defs. Br. (ECF No. 96) at 14 (citation and internal quotation marks omitted)). Those requirements, however, appear only in the *first* sentence of section 702, which defines a cause of action and has nothing to do with the statutory waiver of sovereign immunity:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702; *see also Lujan v. National Wildlife Federation*, 497 U.S. 871, 882–83 (1990) (interpreting the first sentence of section 702 to require a plaintiff to "identify some 'agency action' that affects him in the specified fashion" and "show that he has 'suffer[ed] legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute.'"). And the Supreme Court's opinion in *Lujan* makes abundantly clear that these requirements pertain only to whether a plaintiff has a *cause of action* under section 702—not to whether sovereign immunity has been waived. *See id.* at 882 ("[T]he person *claiming a right to sue* must identify some "agency action" that affects him in the specified fashion" (emphasis added)); *id.* at 883 ("[T]he party *seeking review under § 702* must show that he has 'suffer[ed] legal wrong' because of the

challenged agency action, or is 'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute.'" (emphasis added)). The defendants are conflating the requirements to bring a cause of action under the first sentence of section 702 with the requirements to demonstrate a waiver of sovereign immunity, which are governed solely by the second sentence of that statute.

Of course, the Fifth Circuit's opinions in *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484 (5th Cir. 2014), and *Louisiana v. United States*, 948 F.3d 317 (5th Cir. 2020), likewise conflate the first and second sentences of section 702, and each of these opinions falsely asserts that a plaintiff must satisfy the requirements of the first sentence of section 702 as a prerequisite to invoking the waiver of sovereign immunity that appears in the second sentence of the statute. *See Alabama-Coushatta Tribe*, 757 F.3d at 488; *Louisiana*, 948 F.3d at 321–22. But this Court is required to follow 5 U.S.C. § 702 as the "supreme Law of the Land,"[19] and it cannot disregard a statutory enactment because of careless language that appears in a judicial opinion. Neither *Alabama-Coushatta Tribe* nor *Louisiana* considered or rejected the arguments that we are presenting, so they do not (and cannot) prevent this Court from interpreting section 702 according to what it says. *See, e.g.*, *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Hall v. Louisiana*, 884 F.3d 546, 550 (5th Cir. 2018) ("'[C]ases cannot be read as foreclosing an argument [with which] they never dealt.'" (quoting *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion)); *see also Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124, 1131 n.1 (2015). Section 702 waives sovereign immunity regardless of whether the plaintiffs' cause of action rests on section 702 or some other statute such as the Declaratory Judgment Act.

19. U.S. Const. art. VI, § 2.

In all events, the plaintiffs easily satisfy the phantom requirements that the defendants are attempting to graft on to section 702's waiver of sovereign immunity. The relevant "agency actions" include the EEOC adjudications and guidance documents announcing that Title VII outlaws employment discrimination on account of sexual orientation or gender identity, as well as the lawsuit that the EEOC brought against Harris Funeral Homes—all of which "affect" the plaintiffs by threatening them with possible enforcement action if they fail to comply with the EEOC's announced interpretations of Title VII. *See* Salvesen Decl. (ECF No. 90-4) at ¶ 17; Hotze Decl. (ECF No. 90-5) at ¶ 18. And the plaintiffs are "adversely affected or aggrieved" by the *in terrorem* effects of these challenged agency actions. *See supra*, at Part I.A.

Finally, the plaintiffs do not even need to rely on section 702's waiver because they can simply invoke the *Ex parte Young* exception to sovereign immunity—which applies with full force to federal officials. *See, e.g.*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690–91 (1949) ("[T]he [*Ex parte Young*] principle . . . is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred." (citation and internal quotation marks omitted)). It is rare for *Ex parte Young* to be invoked against federal officials because section 702's waiver of immunity largely tracks the doctrine, but it remains available to be used if section 702 (for whatever reason) is unable to do the job. Of course, *Ex parte Young* allows suit only against officers and not the United States or its agencies, but the EEOC Commissioners are named defendants in this lawsuit and may be sued for declaratory or injunctive relief. *See Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids [sovereign immunity], a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (citation omitted)).

The defendants also complain that we "have not articulated a cause of action for Claims 4 and 5." *See* Defs.' Br. (ECF No. 96) at 14. But that has nothing to do with jurisdiction or

sovereign immunity; the absence of a cause of action is a defense on merits. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 89 (1998) ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case."). The cause of action for Claims 4 and 5 rests squarely on the Declaratory Judgment Act, which authorizes lawsuits by litigants who seek a judicial declaration of their rights. See 28 U.S.C. § 2201(a); *see also* David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45–46. The Declaratory Judgment Act cannot confer jurisdiction or waive sovereign immunity, but it does supply the cause of action that authorizes the plaintiffs to sue the defendants in this case.

II. The Plaintiffs Are Entitled To Judgment On The Merits On Each Of Their Claims

The defendants do not dispute the facts that undergird the plaintiffs' claims, but they insist that they, and not the plaintiffs, are entitled to judgment as a matter of law. The defendants are mistaken on all five claims.

A. The Religious Freedom Restoration Act Compels Exemptions To *Bostock*'s Interpretation Of Title VII

The defendants deny that the plaintiffs have suffered a "substantial burden" on their religious freedom, and they contend that their enforcement of *Bostock* against the plaintiffs is the "least restrictive means" of advancing a "compelling governmental interest." We will address each argument in turn.

1. The Defendants Are Substantially Burdening The Plaintiffs' Religious Freedom

The defendants try to defeat the plaintiffs' RFRA claim by denying that they are imposing a substantial burden on the plaintiffs' religious freedom, but that is untenable. The defendants are charged with enforcing Title VII, and the Supreme Court has held that Title VII *must* be interpreted to prohibit discrimination against homosexuals and transgender individuals. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) ("[N]o ambiguity exists about how Title VII's terms apply to the facts before us."). The EEOC had adopted a

similar interpretation of the statute before the Supreme Court's ruling in *Bostock*,[20] and it has enforced this interpretation against religious employers despite the protections supposedly conferred by RFRA and the First Amendment. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018). The EEOC's guidance documents announcing this interpretation of Title VII refuse to recognize or acknowledge any protections for religious employers under RFRA or the First Amendment,[21] and the EEOC's lawsuit against Harris Funeral Homes makes clear that the Commission has no desire to accommodate employers with sincere religious objections to homosexual and transgender behavior. All of this communicates an unmistakable threat to every religious employer in the United States: Comply with *Bostock*'s interpretation of Title VII or risk investigation and enforcement proceedings from the EEOC. Putting an employer to this choice imposes a "substantial burden" on the exercise of religion. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403–06 (1963); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) ("[A] law that 'operates so as to make the practice of . . . religious beliefs more expensive' in the context of business activities imposes a burden on the exercise of religion." (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)).

The defendants try to downplay this burden by touting a provision of the EEOC Compliance Manual that calls for a "nuanced balancing of potential burdens on religious expression," and that exhorts EEOC investigators to "take great care in situations involving" RFRA and the First Amendment. See Defs.' Br. (ECF No. 96) at 17 (citation and internal quotation marks omitted). That does nothing to alleviate the burdens imposed on the plaintiffs' religious freedom. These mealy-mouthed statements say nothing about whether, or in circumstances, the EEOC should stand down in response to an employer that asserts its rights under

20. *See Baldwin v. Foxx*, EEOC Doc. No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015); *Macy v. Holder*, EEOC Doc. No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).

21. *See* Br. in Support of Pls.' Mot. for Sum. J. Ex. 1–3 (ECF Nos. 90-1, 90-2, 90-3).

RFRA or the First Amendment, and the EEOC's treatment of Harris Funeral Homes should not inspire confidence that these hortatory statements will do anything to restrain commissioners or investigators that are determined to subordinate religious freedom to the LGBTQ agenda. Employers can only guess as to whether the EEOC will protect their religious freedom or prosecute them to the fullest extent of the law, and the EEOC remains free to replay its treatment of Harris Funeral Homes against any religious employer in the United States.

2. The Defendants Have Failed To Demonstrate a Compelling Governmental Interest to Justify the Burden on Plaintiffs' Religious Exercise

If the Court finds that the plaintiffs are suffering a "substantial burden" on their exercise of religion, then the burden shifts to the government to prove that its refusal to exempt religious employers from *Bostock*'s interpretation of Title VII advances a "compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

The defendants assert that "the government has a compelling interest in eradicating discrimination in all forms,"[22] but that is absurd. Employers discriminate all the time and by necessity when choosing among job applicants; they discriminate on account of intelligence, ability, educational background, and other factors that inevitably affect a hiring decision. It is preposterous to say that the government has a "compelling" interest in eradicating *every* form of discrimination. Most forms of discrimination are not only inevitable but entirely desirable, and there is no governmental interest—let alone a "compelling" governmental interest—in countering or eliminating those practices.

The government *does* have a compelling interest in eradicating *racial* discrimination, or at least the courts have so held. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) ("The Government has a compelling interest in providing an equal opportunity to

22. Defs.' Br. (ECF No. 96) at 19 (quoting *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980)).

participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."); *see also Bob Jones University v. United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education"). And at least one Supreme Court decision has held that the governmental interest in eradicating discrimination against *women* is sufficiently "compelling" to override claims of constitutional right. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623–24 (1984). But one cannot leap from those decisions to say that *any* anti-discrimination law will automatically be deemed to advance a "compelling governmental interest." Indeed, any such claim would require the overruling of *Boy Scouts v. Dale*, 530 U.S. 640, 648 (2000), where the Supreme Court refused to allow a state's anti-discrimination law to prevail over a First Amendment claim.

The defendants' insistence that they have a "compelling" interest in enforcing *Bostock* against private religious employers cannot withstand scrutiny given the many exemptions that appear in the Title VII statute, which the defendants refuse to acknowledge or address at any point in their brief. *See* Br. in Support of Pls.' Mot. for Sum. J. (ECF No. 90) at 9–10. The Supreme Court's ruling in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), also sets back the defendants' argument, as it specifically held that the city of Philadelphia's efforts to block discrimination against homosexual couples could not overcome the Free Exercise rights asserted by Catholic Social Services. *See id.* at 1882 ("That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. . . . [T]his interest cannot justify denying CSS an exception for its religious exercise.").

More importantly, *Fulton* indicates that an asserted government interest should not be deemed "compelling" when the government allows exceptions to be made—and Title VII's prohibition on "sex" discrimination (as we have noted) is riddled with exceptions that include the 15-employer threshold as well as the exemption of Indian tribes. *See id.* ("The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures."). At the very least, the defendants must

offer *some* explanation for why the government's "interest" in enforcing Title VII is not quite "compelling" enough to require compliance by small employers or Indian tribes, yet *is* compelling enough to prevail over the plaintiffs' religious freedom. *See id.* ("The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."). The defendants do not engage this discussion from *Fulton*, but this Court (unlike the defendants) does not have the prerogative to ignore a binding Supreme Court pronouncement.

B. The Free Exercise Clause Compels Exemptions To *Bostock*'s Interpretation Of Title VII

The defendants are entitled to judgment on their Free Exercise claim for much the same reasons, in addition to the reasons provided in our motion for summary judgment. *See* Br. in Support of Pls.' Mot. for Sum. J. Ex. 1–3 (ECF No. 90) at 11–13. The defendants, however, suggest that this Court would "turn . . . constitutional avoidance on its head" if it ruled on this constitutional claim when the plaintiffs can obtain identical relief under RFRA. *See* Defs.' Br. (ECF No. 96) at 20. We respectfully disagree.

The defendants are correct to observe that courts should normally avoid issuing unnecessary constitutional pronouncements. *See Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*) ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case"). But there are several countervailing considerations in this case that (in our view) counsel in favor of resolving the First Amendment claims—even if the Court concludes that the plaintiffs should prevail on their statutory RFRA claims. First, this case is being heard by a federal district court, and it would further judicial economy for a district court to rule on all five claims in the event that the appellate courts disagree with one or more of its rulings. Second, there is a very real possibility that Congress might someday enact the Equality Act or amend RFRA in a manner that strips religious employers of their statutory protections, and legislation of this sort has already passed the House of Representatives. It is therefore necessary to ensure—especially in a class-

action lawsuit of this sort—that *all* claims are resolved, so that the absent class members will not face a res judicata defense if they need to assert their constitutional claims in a post–Equality Act world. *See, e.g.*, *Leal v. Azar*, No. 2:20-CV-185-Z, 2020 WL 7672177, at *7–*12 (N.D. Tex. Dec. 23, 2020). Finally, judges are bound by oath to enforce the Constitution and uphold it as the "supreme Law of the Land,"[23] and the "passive virtues" should not be reflexively invoked to shirk the judicial duty to enforce constitutional rights. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964); Philip Hamburger, *Law and Judicial Duty* (2008). That is especially true with regard to the constitutional right of religious freedom, which is currently under an intense ideological attack from LGBTQ and abortion-rights supporters, and is in danger of being read out of the Constitution if judges who share those beliefs are appointed to the bench. It is therefore imperative that the Court rule on whether the plaintiffs' current employment practices are constitutionally protected, even if it concludes that RFRA suffices to provide the requested relief.

C. The First Amendment Right Of Expressive Association Compels Exemptions To *Bostock*'s Interpretation Of Title VII

The defendants correctly observe that the plaintiffs must show that: (1) they qualify as "expressive associations"; and (2) the inclusion of homosexual or transgender employees would "significantly affect" their ability to advocate their viewpoint. *See* Defs.' Br. (ECF No. 96) at 20. But the Salvesen and Hotze declarations supply all that is needed on that front. *See* Salvesen Decl. (ECF No. 90-4) at ¶¶ 12–13; Hotze Decl. (ECF No. 90-5) at ¶¶ 8–11. Bear Creek Bible Church has an explicit statement of faith that declares that "God's plan for human sexuality is to be expressed only within the context of marriage, that God created man and woman as unique biological persons made to complete each other." *See* Salvesen Decl. (ECF No. 90-4) at ¶ 12. And Braidwood is organized and operates as an overtly and

23. U.S. Const. art. VI, § 2.

unapologetically Christian business. *See* Hotze Decl. (ECF No. 90-5) at ¶¶ 8–11. The defendants try to characterize Braidwood as a mere "profit-generating business," but *Hobby Lobby* makes clear that for-profit corporations can exercise religion—and it follows that for-profit businesses can express and espouse Christian beliefs about marriage and human sexuality as well. And each of the plaintiffs is far more overt and explicit about its beliefs than the Boy Scouts of America, which merely required its scouts to be "clean" and "morally straight." *See* Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. Cal. L. Rev. 119 (2000).

It is undisputable that the employment of a person engaged in homosexual or transgender behavior would compromise the message that Bear Creek and Braidwood are attempting to convey as overtly Christian entities—in the same way that the inclusion of a homosexual scoutmaster would significantly affect the Boy Scouts' expressive communications. The defendants make no effort to distinguish *Boy Scouts* in this regard, even though Bear Creek and Braidwood are *far* more explicit about their opposition to homosexual conduct than the Boy Scouts has ever been. Employment of an individual signifies that the employer is at least equanimous toward the employee's conduct and behavior outside the office—that is why many of the Capitol rioters lost their jobs after they were identified on social media. *See* Jaclyn Peiser, *Internet Detectives Are Identifying Scores of Pro-Trump Rioters. Some Have Already Been Fired*, Wash. Post (Jan. 8, 2021), available at https://wapo.st/3wvuE7K (last visited on July 12, 2021). The compulsory inclusion of an employee whose lifestyle contradicts the values of an organization will by definition "significantly affect" the employer's ability to communicate those values.

D. Title VII, As Interpreted In *Bostock*, Does Not Prohibit Employers From Discriminating Against Bisexual Employees

The defendants maintain that *Bostock* protects bisexual employees and job applicants from discrimination on the same terms as homosexuals, but that simply cannot be squared with the language of the Court's opinion. Consider once again the key passage from *Bostock*:

> Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent.

Bostock, 140 S. Ct. at 1742. An employer who discriminates against *all* bisexual employees—regardless of whether they are male or female—cannot possibly be engaged in "sex" discrimination under *Bostock*. That is because the "same trait" (sexual attraction toward members of both sexes) is treated exactly the same regardless of whether that "trait" appears in a man or a woman.

The defendants have no answer to this passage from *Bostock*, and they do not explain how discrimination against bisexuals can qualify as "sex" discrimination under the terms of the Title VII statute. It is not "sex stereotyping" to hold a belief that members of *each* biological sex should refrain from bisexuality and limit their sexual attractions (and sexual interactions) to one or the other sex.[24]

E. Title VII, As Interpreted In *Bostock*, Does Not Prohibit Employers From Establishing Sex-Neutral Rules Of Conduct That Exclude Practicing Homosexuals And Transgender Individuals From Employment

The defendants agree that Title VII allows employers to establish and enforce "sex-neutral rules of conduct," but they deny that the policies proposed by the plaintiffs can qualify as "sex neutral." In the defendants' view, the proposed policies are "different means of accomplishing the same purpose," and they contend that these policies should be as forbidden by *Bostock* as a policy that explicitly excludes homosexual or transgender individuals from employment.

The problem with the defendants' argument is that they never explain how a rule of conduct that applies equally to men and women can qualify as "sex" discrimination, either

24. The defendants mischaracterize the plaintiffs' employment policies when they say that those polices "broadly prohibit 'homosexual' conduct and identity but not 'bisexual' conduct or identity." Defs.' Br. (ECF No. 96) at 23. "Bisexual conduct" includes "homosexual conduct" by definition, because it means that the person is engaged in both heterosexual and homosexual activities. The plaintiffs also do not prohibit their employees from having a homosexual or bisexual orientation; they require only that their employees refrain from homosexual or transgender behavior.

under the text of Title VII or under *Bostock*. If men and women are subject to the exact same rules, and if an employer would refuse to tolerate the identical conduct from an employee of the opposite biological sex, then it impossible to see how the employer has discriminated against an employee "because of such individual's . . . sex." 42 U.S.C. § 2000e–2(a)(1). To hold otherwise would effectively amend the text of Title VII by converting its prohibition on "sex" discrimination into a statute that outlaws discrimination on account of sexual orientation and gender identity—which is exactly what *Bostock* said it was *not* doing. *See Bostock*, 140 S. Ct. at 1746–47 ("We agree that homosexuality and transgender status are distinct concepts from sex.").

The defendants observe that *Bostock* rejected the idea that employers could establish a sex-neutral rule of conduct by prohibiting "homosexual behavior" and extending that rule equally to men and women. *See Bostock*, 140 S. Ct. at 1741–42; *id*. at 1745–46. But that is because the Court held that the relevant prohibition could not be defined at that level of abstraction, and insisted that one must instead look to the employee's precise behavior (sexual attraction to a particular person) and then ask whether that exact situation would be tolerated in a member of the opposite biological sex. *See Bostock*, 140 S. Ct. at 1741 ("Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague."). No such maneuver can be used to defeat the sex-neutral rules of conduct described in the plaintiffs' brief. *See* Br. in Support of Pls.' Mot. for Sum. J. Ex. 1–3 (ECF No. 90) at 16–17.

It is understandable that the defendants would chafe at the formalism of this argument. But *Bostock* is a formalistic ruling—and the entire *Bostock* regime is premised on a hyper-formalistic reading of statutory text. One cannot abandon the formalism of *Bostock* because it might lead to untoward or disagreeable results. And a court must always bear in mind that

there is *no* federal statute that outlaws employment discrimination on account of sexual orientation or gender identify. Any prohibited employment practice in this area must be derived from the statutory prohibition on "sex" discrimination—and an employer cannot discriminate on the basis of sex when enforcing rules of conduct that apply equally to men and women.

CONCLUSION

The defendants' cross-motion for summary judgment should be denied, and the plaintiffs' motion for summary judgment.

Respectfully submitted.

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